

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
SARAH J. HEFFLEY, JUDGE

DIVISION I

CA 06-601

VALERIE LYNN GIFFORD

January 31, 2007

APPELLANT

APPEAL FROM THE SALINE COUNTY  
CIRCUIT COURT

V.

[NO. E-00-636-1]

ALVIE DOYLE TUGGLE

HONORABLE ROBERT W. GARRETT,  
JUDGE

APPELLEE

AFFIRMED

**Sarah J. Heffley, Judge**

Appellant Valerie Gifford appeals from a modification order placing primary custody of the parties' child with appellee Alvie "Buddy" Tuggle. Valerie argues that the trial court erred by making no findings regarding a change in circumstances and that there was no evidence of changed circumstances. She also contends that awarding custody to Buddy was not in the child's best interest. We find no error and affirm.

When the parties divorced in March 2001, they entered into an agreement to share custody of their nine-year-old son, Robbie. Valerie was to have the child from August 15 to February 15 of each year, while Buddy was to have him from February 15 to August 15.

When one parent had physical custody, the other was granted visitation every other weekend. Valerie was also given two weeks during summer vacation.

Problems arose almost from the very beginning, as there was litigation over where the child was to attend school, and whether the child had ADHD and needed medication to treat that condition. In September 2002, Buddy filed a motion alleging that Valerie had refused to abide by the court's orders by failing to return the child's clothing, by deliberately speaking negatively about him, and by encouraging her boyfriend to do the same. In December 2002, Valerie filed a motion for a change of custody, alleging as changed circumstances, the child's preference to live solely with her. Buddy responded to this motion and filed a cross-petition seeking custody of the child, stating that Valerie had "created the situation of which she now complains via habitual violation of this Court's Orders by berating the Defendant to the minor child, denying visitation, and otherwise engaging in a power struggle to alienate the minor child from his father."

These matters were set for a hearing on March 27, 2003, but it was not held because the parties reached a settlement that day of all issues. The next day, however, Buddy filed a motion to temporarily suspend Valerie's visitation. Buddy alleged in the motion that, after reaching the agreement and being cautioned by the child's ad litem to refrain from alienating the child from his father, Valerie and her boyfriend "sought out the minor child when the attorneys left, and deliberately informed the child that the father had been recording his telephone conversations with [Valerie]." The motion further alleged that the

“minor child became uncontrollably miserable and upset” and that he “did not even want to look at his father, much less speak to him.” Based on the motion and affidavits of Buddy and the child’s ad litem, the trial court temporarily suspended Valerie’s visitation.

Another hearing was held on April 9, 2003. In its order from the hearing dated June 13, 2003, the trial court found that “certain events” had occurred at the last hearing “which resulted in the great upset” of the child. The order provided that Valerie and her fiancé “are explicitly warned that any further actions intended to, or which reasonably do, further alienate the minor child from [Buddy] will be grounds for immediate and severe restriction of her rights as set out herein.” The order also incorporated the parties’ settlement agreement, which provided that they would continue to exercise joint legal and physical custody of the child, although there was a change in the schedule. Valerie was to have primary physical custody during the school year. Buddy was to have visitation for the first three weekends of September through May from Thursday after school until Monday morning. Buddy was also to have primary physical custody during summer vacation, with Valerie having visitation for the first three weekends of each month from Friday to Monday morning.

The present phase of the litigation began in March 2005, when Buddy filed a motion to change custody. As changed circumstances, Buddy alleged that the joint-custody arrangement was not working; that Valerie continued to insist that the child remain on medication for ADHD; and that Valerie had continued to strain the father-son relationship

by making derogatory remarks about him. In her pleadings, Valerie agreed that there had been a material change in circumstances because the joint-custody arrangement had proved unworkable, but she contended that she should be the primary custodian of the child. After the hearing, the trial court awarded Buddy primary physical custody of the child. This appeal followed.

Prior to discussing the testimony presented at the hearing, we are reminded of our standards of review and the law pertinent to change-of-custody decisions. In reviewing child-custody cases, we consider the evidence *de novo* but will not reverse the trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Middleton v. Middleton*, 83 Ark. App. 7, 113 S.W.3d 625 (2003). Although there is evidence to support it, a finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Id.*

Custody should not be changed unless conditions have altered since the most recent custody order was rendered, or material facts existed at the time of the last order but which were unknown to the court, and then only for the welfare of the child. *Gerot v. Gerot*, 76 Ark. App. 138, 61 S.W.3d 890 (2001). The court must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold is

met, the court must then determine who should have custody with the sole consideration being the best interest of the child. *Id.* Our courts require a more rigid standard for custody modification than for initial custody determinations so as to promote stability and continuity for the children and to discourage repeated litigation of the same issues. *See Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). We also note that, while a child's preference is not binding, it is certainly a factor to be considered by the trial court in making a custody decision. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.3d 105 (1999).

Prior to trial, the trial court reviewed the deposition of Dr. Paul L. Deyoub, a clinical psychologist, who had been appointed by the court. Dr. Deyoub had conducted evaluations in 2001 at the time of the divorce, in 2003 in conjunction with the previous change-of-custody dispute, and again in 2005 in connection with the present litigation. Dr. Deyoub had recommended joint custody in 2001, saying that Buddy was more interested in split custody than Valerie, who had wanted sole custody. He also recommended against Valerie's potential move out of state, feeling that it would exacerbate the situation because of Valerie's criticisms of Buddy. He cautioned that, if one parent "misbehaves or sabotages the arrangement, that sole custody to the non-offending parent should be considered."

Dr. Deyoub testified that ADHD had been a concern from the outset, as the child had been placed on medication for ADHD since the first grade. It was Dr. Deyoub's

position in 2001 that Robbie, then age nine, did not have ADHD and that he did not need to be on medication. He said that many factors are considered in determining whether a child has ADHD, and at that time he conducted a battery of tests. The objective data indicated no ADHD, and he said that testing completed by a teacher did not show any rating for ADHD. Dr. Deyoub said that Robbie had excellent scores, and he explained that to have such scores indicating no ADHD at age nine was critical, saying “You’re not going to suddenly develop ADHD. You’re not free of ADHD at age nine and get it later. This doesn’t happen.”

Dr. Deyoub tested Robbie again in 2003, and the results were no different and showed that he had excellent academic ability in that his scores were all average and above average. Dr. Deyoub also reported at that time that Robbie had excellent attention and concentration with no deficits. Dr. Deyoub recommended that the joint-custody arrangement continue because he felt that sole custody in Valerie was not in the child’s best interest. He said that his belief was based on the “clinical problem that [Valerie] has in terms of her focus on ADHD,” and on her efforts to alienate the child against Buddy. He said that, if the child had been having problems with Buddy, “his mother has used those problems as an opportunity to build a case for change of custody, rather than encouraging Robbie to solve these problems and have a good relationship and a good experience at the father’s house.” Dr. Deyoub wrote in his report of 2003 that:

If custody is changed to the mother, my concern is there will be continuing deterioration of the relationship with his father,

who I think is a decent person and has not done anything to warrant alienation from his son. I am not sure if Robbie is just acting out a role about wanting to live with his mother, but I think the mother needs a strong message that the arrangement is going to continue this way and she needs to support the relationship with the father.

Dr. Deyoub conducted the same and additional tests during the 2005 evaluation. He categorically stated that Robbie did not have ADHD. He said that Valerie, however, remained convinced that he did. He described Valerie as having a “rigid” attitude and stated that she displayed a “stunning lack of ability” to consider the results of the previous tests and that she disregarded them because of the adversarial situation. He testified that Valerie had told him that the situation was not going to end and that she wants Robbie on the medication and that it is going to continue.

Dr. Deyoub was aware of a report from a counseling clinic conducted in 2004, but he said the report contained no significant finding for ADHD. He was also aware of a two-month blind study that had been discontinued because Robbie had lost seven-to-eight percent of his body weight while taking the medication. He said the mother and teachers had reported that Robbie had performed better in school when he was taking the medication. Of those two tests, Dr. Deyoub said that Valerie “would seek out an answer until she gets it.”

Dr. Deyoub discounted the test done at the counseling clinic because it had been based on the type of evaluation that could not definitively be used to diagnose ADHD. He also discounted the evidence that Robbie seemed to do better in school while taking the

medication. Dr. Deyoub said that his doing better was a self-fulfilling prophecy in that Robbie might do better while taking the medication because he had been conditioned to believe that it helps him, saying “suggestibility is extremely powerful.” He believed that Robbie’s performance was affected by his own knowledge of when he was on and off the medication. He stood by his diagnosis that Robbie does not have ADHD and that he needs no medication. Dr. Deyoub objected to the medication that Robbie had been taking, Adderal, because it was a controlled substance, a stimulant, a type of amphetamine and a psychotropic drug that affects growth and appetite. He believed that Robbie had become psychologically dependent on it.

Dr. Deyoub further testified that Robbie had a serious negative attitude about his father and that he was very much on his mother’s side. Robbie had written him a letter in which he said that he liked it better at his mother’s because he has more freedom and that he can do as he pleases so long as she knows where he is. Robbie also told him that he wants to see his father when he wants to and that he did not want set visitation.

Dr. Deyoub recommended that custody be changed to Buddy. He said that, if the split custody arrangement continued, there would be a further deterioration in Robbie’s relationship with Buddy. His chief concern remained Valerie’s refusal to believe that the child did not have ADHD and her insistence that he remain on medication.

Buddy testified that, in the two years since the last hearing, pressure had been put on Robbie to distance himself from him. He said that in the past month he had approached

Robbie about perhaps moving to Greenbrier and showed him the land there. He said that Robbie was ecstatic, “probably the happiest I had seen Robbie in a long time.” Buddy said, however, that Robbie had “done a complete one eighty” since he returned to Valerie’s custody, and no longer wanted him to move. He said this was part of a pattern in his relationship with Robbie: he and Robbie got along great when Robbie stayed with him and his wife, but that Robbie underwent an attitude and personality change after being with Valerie and her husband.

Buddy also complained that he did not always get timely notice of school events and that he had not received school pictures. He was not happy that Robbie had his school picture taken while wearing a tee-shirt and having long, unkept hair. He said that Robbie used to play baseball and basketball, but that he had dropped those activities without his being consulted.

Buddy said he also was not consulted when Robbie met his birth mother, who was Valerie’s distant relative and who lived in Oregon. The birth mother arrived a week before the last hearing, and Buddy said that he was told that she was going back to Oregon prior to the hearing. Instead, she stayed and was present at the hearing. Buddy felt that Valerie and the birth mother were “teaming up” on him, and he said that Robbie had lied to him when Robbie indicated during a telephone conversation that the birth mother had left town. Buddy felt that Valerie had influenced Robbie to lie to him about the birth mother’s departure.

Buddy did not approve of Robbie taking Adderal. He said that he had agreed to the blind study but that he and Valerie entered into a written agreement providing that Robbie was to be taken off the drug if his weight decreased by five percent. He said that Buddy lost ten pounds, or eight percent of his body weight, but that Valerie refused to take him off the drug. Buddy said that he received permission from the child's doctor not to give Robbie the medication when Robbie was staying with him.

Buddy testified that joint custody was not working, calling it "a constant war." He spoke of an occasion where he and Valerie had agreed to ground Robbie until his grades improved. Unbeknownst to him, Valerie removed this punishment two weeks later without telling him. Buddy said that there had not been enough time for his grades to have improved, and he said that his continued punishment made him out to be the bad guy. Buddy also was concerned that Robbie was at home after school without supervision. He said that one day he went to pick Robbie up at Valerie's and there were several boys and a girl there. He did not approve of Buddy having company during that time, especially girls, at his age.

Buddy said that Valerie was the primary reason Robbie did not want to live with him in either Benton or Greenbrier. Some of Robbie's instant messages to his friends, written three weeks before the hearing, were introduced into evidence during Buddy's testimony. In one of the messages, Robbie wrote in reference to the move to Greenbrier, "I don't want to leave my friends, but after actually thinking about it, they're [Buddy and his wife] not

that bad, cause if you're around my mom and Pat [Valerie's husband] when they're having a bad day, they tend to get me to dislike my dad badly. But they're really not that bad. So I don't know who I want to live with. It's confusing." When asked by a friend why he wanted to move to Greenbrier, Robbie said "because my dad wants full custody and I kind of want to live with him. I don't want to leave my friends, but I do want to move to Greenbrier. I do want to live with my dad." In another instant message, Robbie was asked why he wanted to live with his father, and Robbie said, "It would make it where I would actually have to work and get good grades and have more responsibility." Also, a friend wrote, "I thought you hated him [Buddy]," to which Robbie responded, "All I've been saying has come from my mom. She's been making me believe he was a bad person, but he's really not."

Robbie testified that three weeks before the hearing he wanted to live with his father but that he had since changed his mind. He said that he realized how much he did not want to leave Benton after speaking with his friends. He admitted that part of his opinion came from pressure he had gotten from his mother, but he also said that his father had pressured him as well. Robbie spoke of a visitation schedule that a friend of his had where his friend did not have to visit his father on the weekends if he had other plans.

Robbie said that it was expected of him to tell his father that his birth mother had left and was thus not staying for the hearing held two years ago. Robbie further testified that he had asked his father to take him camping for four years and that the only time they

had camped was in the back yard. He also said that he had been asking his father to find his birth mother, and that his father had told him that he was trying, but he “never got anything out of it.” Robbie said that he had quit sports because of his poor grades. Robbie also testified that his father got angry about small things. He said that there was a time when he did not want to go to the fair and that his father threatened to ground him if he did not go. He said his father yelled at him for running over a pipe with the lawnmower and that later his father apologized because the mower had been damaged because he [Buddy] had run over a trash bag. Robbie also said that his father once grabbed him by the throat and threw him on the bed, after Robbie had bolted his bedroom door after breaking a cheap watch.

Valerie testified that she had not applied any pressure on Robbie since the last hearing. She said that, when she had ungrounded Robbie following his poor grades, she did not feel the need to tell Buddy about it. She said she removed the punishment because she knew Robbie’s grades had improved in those two weeks by checking on edline. Valerie also said she had not taken Robbie off the medication when he lost weight because the doctor said that it was alright to keep him on it. She said there was a significant difference in Robbie’s grades when he was taking the medication. She testified that she did not encourage Robbie to be untruthful to Buddy about the birth mother still being in town for the hearing. She said she did not have any notice that school pictures were being taken that day when Robbie was wearing a tee-shirt. She confirmed that Robbie had

friends over after school before she got home from work.

Valerie further testified that she had no intention of having Robbie reassessed for ADHD, saying “that’s the end of the issue.” Valerie also said that she and her husband had not made any derogatory or negative comments about Buddy in the last two years. She said that Dr. Deyoub may have stated that she was discouraging the relationship between Robbie and his father, but Dr. Deyoub left a lot out of his report.

Susie Carter testified that she taught Robbie Civics and American History. She said that Valerie contacted her more often with regard to Robbie’s scholastics. She said that Robbie does fine in her class and that his grades ranged from B’s to C’s.

Erica Martinous was Robbie’s English teacher. She said that Valerie communicated with her more than Buddy about Robbie’s grades. She had sent Buddy an email about Robbie, but she said that Buddy did not respond. She said that Robbie had made an F the previous semester when he was in the advanced English class, but that he seemed to be doing better once he was removed from that class. She said that she had discussed this change with both parents.

Donna Tuggle testified that she had been married to Buddy for four years. She said that she had pled guilty to criminal mischief last year in relation to a shoplifting charge at Wal-Mart. She said that it was the first time she had been charged with shoplifting, and she said that her attorney had advised her not to speak about the incident.

Dennis Hill testified that in January 2005 he worked in loss prevention at Wal-Mart.

He said that he saw Donna Tuggle come into the store with an item that she returned at the service desk. He said that she took the return sticker off that item, and then later placed the return sticker on a casino game. He said that she also put a decorative world globe in her shopping cart and exited the store without paying for either item. He said that the police found bar code stickers from other stores as well. He said that Mrs. Tuggle had been banned from the Wal-Mart store.

Pat Young testified that he had been married to Valerie for two years. He said that neither he nor his wife made disparaging remarks about Buddy and his wife. He said that sometimes he drinks before driving. Mr. Young testified that he took Robbie to buy Father's day, birthday, and Christmas gifts and that he had been teaching Robbie woodworking. He said that he had offered to make Buddy a sign for Buddy's new house, but that Buddy declined the offer, "if I had anything to do with it." He said he had swapped weekends with Buddy when Buddy wanted to have Robbie for a special family gathering.

Valerie first argues that the trial court erred by not making any findings that there had been a material change in circumstances. However, the trial court's failure to make findings regarding changed circumstances provides no basis for reversal. Where no specific findings are made, we may nonetheless conclude under our de novo review that there was sufficient evidence from which the trial court could have found a change in circumstances. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

Valerie also contends that there was no evidence of changed circumstances. We cannot agree. In the first place, Valerie admitted in her pleadings that a change in circumstance had occurred because the joint-custody arrangement was not working. There was also an abundance of evidence to support that assertion. The parties differed on such basic matters as discipline, after-school supervision, whether the child had ADHD, and whether there was a need for medication. The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of joint custody. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). When the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of a child, this constitutes a material change in circumstances affecting the child's best interests. *Id.* We find no error.

Valerie's final argument is that the trial court's best-interest determination to place custody with Buddy is clearly against the preponderance of the evidence. Upon our review, we are not left with a definite and firm conviction that a mistake was made. We are troubled by evidence that reflects poorly on Buddy having custody of the child. There was testimony that Buddy was quick-tempered and less attentive to the child's education; he pressured Robbie to live with him. Buddy's wife is a convicted shoplifter. In addition, the child stated that he preferred to live with Valerie. On the other hand, there were certainly negatives associated with placing sole custody in Valerie. There was evidence that she persisted in her efforts to alienate the child from Buddy, despite being warned by

the court to refrain from doing so. She remained adamant that the child had ADHD, even though extensive testing by a qualified expert showed that he did not. Valerie also refused to take the child off the medication after he suffered a significant weight loss.

It was for the trial court to decide which parent would serve the child's best interests. As we have observed, trial courts cannot always provide flawless solutions, especially where only limited options are available. *Respalie v. Respalie*, 25 Ark. App. 254, 756 S.W.2d 928 (1988). Giving special deference to the trial court's superior position to evaluate the witnesses and their testimony, we simply cannot say that the trial court's decision was clearly erroneous.

Within her argument, Valerie also complained that Dr. Deyoub's recommendation to change custody to Buddy was improper because it embraced the ultimate issue. Valerie raised no objection on this ground, and we do not address issues raised for the first time on appeal. *Allen v. Allison*, 356 Ark. 403, 155 S.W.3d 688 (2004).

Affirmed.

HART and MARSHALL, JJ., agree.